THE CRY FOR LAW REFORM

By Robert C. Smith.

Are we too much dominated by phrases? I am satisfied that both in argument and in judgment a very considerable amount of bad law goes unchallenged because it is couched in very presentable English. The influence of phrases in political campaigns is, of course, well known. Lord Beaconsfield carried an election by the words "peace with honor." Wonderful deeds of valor did the Highland clans perform when inspired by the "slogan" or rallying battle-cry! What two words could make a more captivating union than "law" and "reform," uniting the saving principle of civilization with the spirit of modern progress? Who could be opposed to it? Of course, we are all in favor of law reform. It must mean something very desirable. We shall not dream of saying of it as some of the old Tory peers did of the English Reform bill, that "it comes neither recommended by the weight of ancient authority, nor by the spirit of modern refinement." I hope I may not be classed as an opponent of law reform if I venture to ask for anything so matter of fact as a definition of its purview or purpose. Is it intended to reform the whole body of substantive law? Neither language nor law was a general preconcerted scheme to provide for future social needs. They both followed, not preceded, the social evolution. I have not heard it suggested that there shall now be undertaken a general revision of all branches of the law. Advanced socialism would probably be alone in advocating this. Individual ownership, rights of contract, the order of succession, freedom of willing and other fundamental portions of the law probably represent what the immense majority of our people believe to be right in principle. Law cannot be crystalized into any form that will forever meet all the requirements of progressive society. As necessities arise, they must be intelligently dealt with, and they will be much more effectually dealt with, as they are felt to exist, than theoretically as part of a general system of reformation.

As co-operation in the way of incorporation became so striking a feature of commercial and industrial activity, the great body of law specially applicable to joint stock companies gradually grew up with the development which made it necessary. When some

more convenient and efficacious way of doing things is discovered, it is first proved and then adopted; and so the Torrens and other systems of registration became law, superseding earlier and cruder systems. The desirability of uniformity, particularly in commercial law, is obvious, and the Commissioners on Uniform State Laws, by profound research and patient work, have accomplished and are accomplishing splendid results. So may we look for general advancement. But how many of those who join in the cry for "Law Reform" have any definite idea of what they are advocating? A living and active community will, of necessity, always need new laws and amendment of old ones, and it can scarcely be said that on this continent we are deficient in the necessary amount of variety of legislative authority for the purpose.

When the demand for law reform assumes a concrete shape at all, it is generally with regard to procedure, i.e., the machinery and methods of giving effect to the law, and the reforms principally called for relate to expedition and economy. Professor Goldwin Smith is credited with saying, "You might as well expect the tigers to clear the jungle of their hiding places, as expect law reform from the lawyers." This, no doubt, merits an angry growl, but the professor would probably not hear it. Unless it is proposed to discard all that the experience of ages has taught, and to begin experimenting over again, reform in procedure must necessarily come from the lawyers. We would not expect the land surveyors to define good practice in applied electricity, nor invite the clergy to revise the rules of the stock exchange. We are all agreed that it is most desirable that a cause should be decided as soon as possible after it is instituted. Tardy justice is, in many cases, no justice at all. But before suggesting reforms let us determine definitely the reason why there are such arrears in many courts. The ordinary delays in pleading and procedure are not a serious matter, but the business of the courts is frequently far in arrears. My belief is that one reason, if not the main reason, is of the simplest possible kind. The public expect the judges to do more than they reasonably can do. It is quite reasonable to lay down any rule as to the number of cases which ought to be heard and decided within any given time, nor can anyone but the judge himself determine how long he should deliberate upon any given case. If a judge be worthy to administer justice at all, may he not be trusted to devote his own time conscientiously to the public service, and to press forward the business of the court in which he presides, as rapidly as is consistent with safety? There

should be no cheese-paring in connection with the administration of justice. The courts should have enough divisions and enough judges to efficiently discharge the business coming before them, and until this, at least, is assured, there can be no satisfactory reform. It may be said that the judges are not complaining of overwork. But their position is naturally a delicate one, just as it is with regard to their salaries. Why does not some reformer investigate the subject of judicial salaries? He would find that they are fixed upon a hopelessly inadequate scale. In Canada, a few years ago, there was a general increase, but it was altogether insufficient. Judicial salaries were, in many cases, fixed long ago, when the cost of living was much less and the various governments in a much poorer condition to pay salaries. It is a very striking anomaly that those who are performing the highest and most important duties in the state, should, as a rule, be so miserably remunerated. That, of course, has no relation to the other question, whether enough judges have been supplied efficiently to discharge the business of the courts.

Another prolific cause of delays is the number of appellate courts, and the facility with which appeals are taken. The whole question of appeals is beset with difficulties. The appellate system naturally reposes on the postulate that the judgment of the court of final resort is always right. To the Supreme Court of the United States, and to the House of Lords in England, we must attribute infallibility. The whole fabric is founded on that idea. And the same is true of other courts whose jurisdiction is final. The right of appeal is a very important one and not lightly or hastily to be surrendered. The court of first instance is more careful because it exists. I am not familiar enough with the procedure in many of the states, as to appeals, to write on the subject generally, but I believe it worth inquiry whether some of the intermediate appeals might not with advantage be dispensed with, and the delay in the hearing, from whatever cause it arises, be materially shortened, even if Appellate Divisions have here and there to be duplicated to overtake the work. Reform in the matter of delay is a necessity, and will never be obtained without the earnest co-operation of Bench and Bar. It is, however, quite evident that it can be obtained.

Upon the other reform, viz., the making of resort to the courts less expensive, I do not feel so sure that it can be accomplished; at least, in the manner and to the extent that would place the rich

and poor on level terms in litigation. The duties and fees payable to Government ought to be reduced to a minimum. The administration of justice is not to be run as a commercial enterprise, with a view to making receipts and disbursements at least equal. But even when this has been done, we are not much advanced toward our reform. The Government's share of bills of costs is not a very large one. Counsel fees are by far the larger portion of every bill of costs. We are often told in our profession that we must not remove the ancient land-mark, that we must resist the innovations of commercialism; and that we must maintain and cherish the high ideals which originally established the honor of the Bar. Very true, and I range myself on the side of the conservative forces. I like to feel that counsel are officers of the court; that it is their duty to see that no injustice prevails, etc., etc. Nothing can ever be effectively done, however, without realizing and taking account of actually existing conditions. The brutal facts are that the profession of the law is carried on, among other things, for profit; that those who attain skill and distinction in it expect to be paid higher fees than those who do not; that it is a great advantage for a litigant to be represented by able counsel, and that the poor litigant is at a manifest disadvantage in this respect. In some of the older countries I understand that the legal profession is recruited from those who neither expect nor desire to make money in it. It is looked upon more as a vocation of honor than emolument. An experience I had a short time ago rather supports this. I required to obtain an opinion in Germany upon a matter involving over $100,000. I received the opinion from a Doctor of Laws, of high standing, and a memorandum of charges composed of two items: "Conference with your agent" and "My opinion upon the question," the total charges being twenty-four marks, or in United States currency, $6.00. I do not know why this simple little bill should have caused such an awakening of conscience, or why I should suddenly have felt such a weight of accumulated guilt. I could only obtain relief by thinking of all my very dear learned friends of New York. Even if true, as the Scripture saith: "Though hand join in hand, the wicked shall not go unpunished," I gathered a vast amount of illogical and unscriptural comfort from the reflection that my fees had been a not very dark grey—something between the angelic whiteness of German leniency and the "blackness and darkness and thick smoke" of the American metropolis.

There is unquestionably an advantage in being able to retain leading counsel. How this can be obviated, it is difficult to see. It would not be practicable to have a State advocate in every court to oversee trials and equalize the benefit of counsel, so to speak. The advantage which the affluent enjoy as regards counsel, though, is much more than offset by the slight *penchant* of the Bench and the all-devouring prejudices of the jury, against corporations, and the representatives of money influence generally.

Quite apart from the popular cry for law reform, which is neither prompted by definite knowledge nor controlled by appreciation of the difficulties in the way, there is the earnest desire in the profession itself that anomalies should be removed, and that the administration of justice should at least keep pace with the enlightenment and progress of the times. I believe the weight of opinion in the profession is that any systematic revision of the substantive law with a view to its reformation is undesirable and practically impossible, but that there is a wide field for reform in procedure, in the direction of simplicity and despatch and to some extent, economy. That procedure should be simplified requires no argument. The fullest powers of summary amendment should be vested in the courts, provided that no suitor should thereby be taken by surprise. That it should be possible for any cause to be disposed of upon technical grounds, without its merits having been determined, is a serious reflection upon our whole legal system. Delays must be shortened and costs reduced as far as possible. Let the subject, however, be approached with some sense of responsibility. One may not set any limit to discovery and invention in the natural sciences, but it is quite safe to predict that justice can never be administered by any penny-in-the-slot device. Neither in the wisdom of the ancients nor in all the ingenious novelties of to-day, do we find any substitute suggested for the exercise of judgment by skilled and disciplined intellects in order to define rights according to fixed rules of law.

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